Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

LOCAL UNION NO. 272 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioner,

v.

PENNSYLVANIA POWER COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a federal court may vacate a labor arbitration award on the ground that the award did not draw its essence from the collective bargaining agreement when the federal court acknowledges that the award was based on the collective bargaining agreement?

Whether a federal court may vacate a labor arbitration award on the basis that "the award conflicts with the express terms of the collective bargaining agreement" when the arbitrator in fact construed and/or interpreted the collective bargaining agreement in rendering the award?

Whether a federal court may vacate a labor arbitration award on the basis that the award conflicts with the express terms of the collective bargaining agreement when the provision at issue is ambiguous?

Whether the decision of the Court of Appeals for the Third Circuit erred by conflicting with this Court's cases limiting review of an arbitrator's award entered pursuant to an agreement between an employer and a labor organization?

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OPINIONS BELOW

The opinion of the divided court of appeals below, with Judge Alito dissenting, is reported at 276 F.3d 174 (3rd Cir. 2001), and is reproduced in Appendix C. App. 5a. The order of court of the appeals below amending the opinion is reproduced in Appendix A. App. 1a. The order of the Court of the appeals below denying the petition for rehearing and suggestion for rehearing *en banc* is reproduced in Appendix B. App. 3a. The opinion of the district court is unreported and is reproduced as Appendix E. App. 25a. The arbitration opinion and award issued by Arbitrator Clare B. McDermott is unreported and is reproduced as Appendix F. App. 39a.

JURISDICTION

The court of appeals below entered its Judgment on December 21, 2001. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on January 30, 2002. App. 4a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court below had jurisdiction over this case under Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) ("Section 301"). The court of appeals below had jurisdiction pursuant to 28 U.S.C. § 1291.

STATUTES INVOLVED

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) is stated in relevant part as follows:

> Suites for violation of contracts between an employer an a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought

> in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy or without regard to the citizenship of the parties.

Section 8(a)(3) of the National Labor Relations Act is stated in relevant part as follows:

> (a) It shall be an unfair labor practice for an employer-
>
> . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . .

STATEMENT OF THE CASE

The Petitioner, Local Union 272, International Brotherhood of Electrical Workers, AFL-CIO ("Local 272") and the Respondent, Pennsylvania Power Company ("Penn Power"), were both party to a collective bargaining agreement. Penn Power maintained a single employee pension plan in which both supervisors and union employees were participants and beneficiaries. Penn Power paid money into the pension plan on behalf of both groups of employees. The money it paid on behalf of the union employees was as a result of rights obtained by the union through collective bargaining.

Penn Power conditionally offered the union employees voluntary retirement pension ("VRP") benefits if two (2) conditions were met: (1) the union employees cooperated with the company in attaining production efficiency; and (2) a

reduction in work force was necessary. Penn Power retained the exclusive discretion to decide whether both conditions were met. Penn Power decided that the union employees did not cooperate to its satisfaction and refused to offer the union employees the VRP benefits. Thereafter, Penn Power unconditionally offered the VRP benefits to the supervisory employees. Penn Power paid the supervisory employees the VRP benefits with funds taken out of the pension plan of which both groups were beneficiaries.

As a result of this disparate treatment, Local 272 filed a grievance pursuant to, among other things, Article I, Section 3 of the collective bargaining agreement, which states:

> The Company and the Union agree that they will not discriminate, coerce, nor intimidate any employee because of membership or non-membership in the Union . . .

Local 272 and Penn Power were unable to amicably resolve the matter so the case proceeded to arbitration, wherein both parties agreed to allow a labor arbitrator to interpret their agreement and decide the dispute. Thereafter, a full hearing was held and the arbitrator found that Penn Power had violated Article I, Section 3 of the collective bargaining agreement. The arbitrator concluded that Penn Power never proffered a legitimate reason as to why supervisory employees were not subject to the same qualifying conditions for VRP benefits, and lack of such evidence in the record amounted to proof of discrimination against the bargaining unit employees. The arbitrator wrote:

> the Company made these [VRP] benefits available to Bruce Mansfield Supervisory personnel, and it has not been explained how

> they escaped the same hurdles which barred receipt of these benefits by Bruce Mansfield bargaining unit employees.
>
> . . .
>
> Company witness Lubich made it clear that both groups were in the same [pension] plan, designed for all Ohio Edison and Pennsylvania Power bargaining-unit employees and Management personnel. Thus, the Company's making these VRP benefits available to Supervisory personnel at Bruce Mansfield even though they failed to meet the qualifying conditions, while denying those benefits to Bruce Mansfield bargaining-unit employees for failure to meet the same conditions constituted improper discrimination, in violation of Article I, Section 3 of the Agreement.
>
> So far as disclosed by this record, the posture of the two groups - Bruce Mansfield supervisors and Bruce Mansfield bargaining-unit employees - was the same. Thus, for purposes these VRP benefits, they were alike, but they were not treated alike. That is the improper discrimination charged by the union.

App. 33a.

On August 31, 2000, Penn Power filed a Complaint in the United States District Court for the Western District of Pennsylvania against Local 272, seeking to vacate the labor arbitration award. On October 20, 2000, Local 272 filed an Answer to the Complaint.

On December 28, 2000, Local 272 filed a Motion for Summary Judgment. On January 19, 2001, the Company also moved for Summary Judgment.

On April 9, 2001, the District Court issued a Memorandum Opinion and Order denying the Company's motion for summary judgment and granting Local 272's motion for summary judgment. The District Court concluded that the arbitrator's award drew its essence from the collective bargaining agreement and that it did not violate public policy. On May 1, 2001, Penn Power filed an appeal to the Third Circuit Court of Appeals seeking to reverse the District Court.

On December 21, 2001, a majority of the Panel (Circuit Judges Barry and Rosenn) issued an Order reversing the case and remanding it to the District Court to vacate the award. The majority concluded that the arbitration award did not draw its essence from the collective bargaining agreement. Circuit Judge Alito dissented, finding that the majority substituted its interpretation of the agreement for that of the labor arbitrator in contradiction to recent United States Supreme Court decisions, namely, Major League Baseball Players Association v. Garvey, 532 U.S. 504 (2001), and Eastern Associated Coal Corporation v. United Mine Workers of America, District 17, 531 U.S. 57 (2000).

On January 3, 2002, Local 272 filed a Petition for Rehearing and Suggestion for Rehearing En Banc on the grounds that the majority's decision was irreconcilable with the recent decisions of the U.S. Supreme Court. On January

30, 2002, the Third Circuit Court of Appeals denied rehearing en banc.[1]

REASONS FOR GRANTING THE WRIT

First, the circuit courts are now split on the issue of the appropriate interpretation of the following U.S. Supreme Court mandate, which ruled that an arbitrator's award:

> "must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. But, as long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision."

Major League Baseball Players Association v. Garvey, 532 U.S. 504, 509, 121 S.Ct. 1724, 1728 (2001); Eastern Associated Coal Corporation v. United Mine Workers of America, District 17, 531 U.S. 57, 62, 121 S.Ct. 462 (2000) (*quoting* Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); Paperworkers v. Misco, Inc., 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987)).

The First, Fifth, Eighth, and Ninth Circuits have loyally complied with the U.S. Supreme Court's recent mandate. However, the Third, Sixth, and Seventh Circuits

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[1] Chief Judge Becker and Judges Alito and Ambro voted to grant a rehearing en banc.

have circumvented this Court's standard by implementing a new standard, namely, that a federal court may overturn an arbitrator's award when it "conflicts with the express provisions of the Agreement." In other words, when a federal court disagrees with the arbitrator's interpretation of a collective bargaining agreement, it may overturn such an award by finding that the award conflicted with the agreement. The Third, Sixth, and Seventh Circuits have merely paid lip service to the above mentioned mandate of the U.S. Supreme Court while creating their own inconsistent standard.

Second, the decision of The Third Circuit Court of Appeals conflicts with the U.S. Supreme Court's decisions limiting review of an arbitrator's award entered pursuant to an agreement between an employer and a labor organization. The Court of Appeals below overturned the arbitrator's award simply because it strongly disagreed with his interpretation of the collective bargaining agreement. Although the Court of Appeals recited the U.S. Supreme Court's longstanding law regarding the narrow review of labor arbitration awards, the substance of its decision reveals that it substituted its judgment for that of the arbitrator.

Third, the U.S. Supreme Court has recently specifically addressed two (2) of the three (3) standards for arbitration appeals within Eastern Associated Coal Corp., 531 U.S. 57 (2000) and Garvey, 32 U.S. 504 (2001). In Eastern Associated Coal Corp., the U.S. Supreme Court addressed the question of whether considerations of public policy rendered an arbitration award unenforceable in a case where a truck driver was reinstated to his job after twice testing positive for marijuana. Id. In Garvey, this Court dealt with the issue of when an arbitration award could be overturned on the basis that it was not supported by the record. Id. The present

question of whether an arbitration award draws its essence from the collective bargaining agreement would complete a trilogy putting the endless arbitration appeals to bed. A decision denying this petition would permit the flood gates of federal filings and appeals on this issue to continue to flow.

I. THERE IS A CONFLICT AMONG THE CIRCUITS CONCERNING THE INTERPRETATION OF THIS COURT'S MANDATE AS PRONOUNCED IN EASTERN ASSOCIATED COAL CORP. V. MINE WORKERS AND MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION V. GARVEY

A majority of a panel (2 to 1) of the Third Circuit Court of Appeals ordered that the arbitrator's award be vacated because the "decision conflicts with the express provisions of the Agreement between the Company and the Union." App. 18a. In the present case, the arbitrator based his decision upon Article I, Section 3 of the collective bargaining agreement, which stated that the company may not "discriminate " against "any employee because of membership or non-membership in the Union." Penn Power maintained a single employee pension plan in which both supervisors and the bargaining unit employees were participants and beneficiaries. The arbitrator found that when the company unconditionally offered the VRP benefits to the supervisors while requiring the union employees to climb over hurdles before being offered the VRP benefits, it violated Article I, Section 3.

There is no question that the arbitrator was interpreting Article I, Section 3 of the collective bargaining agreement when he rendered his decision. The Court of Appeals below acknowledged the same stating, "[h]e reached

this result on the basis of the collective bargaining agreement." App. 13a. Notwithstanding the fact that the arbitrator honestly interpreted the collective bargaining agreement, the Court of Appeals replaced his interpretation with its own:

> This provision of the contract is common in many labor contracts. It **apparently** finds its genesis in sections 8(a) and (b) of the National Labor Relations Act, 29 U.S.C. §§ 158 (a), (b) relating to unfair labor practices. . . . Because supervisors are not "employees" under the NLRA for purposes of collective bargaining, an employer's affording retirement benefits to supervisors but not providing them to union member employees cannot possibly constitute discrimination between employees especially under the anti-discrimination section of the Agreement.

App. 15a-16a. (emphasis added).

In vacating the arbitrator's award, the Third Circuit Court of Appeals noted the Sixth Circuit Court of Appeals:

> In *Appalachian Regional Healthcare, Inc. v. United Steelworkers of America, AFL-CIO, Local 14398*, 245 F.3d 601, 605 (6th. Cir.), *cert. denied* --- U.S. ---, 122 S.Ct. 350, 151 L.Ed.2d 264 (2001), the court vacated an arbitrator's award because it conflicted with the express provisions of the collective bargaining agreement.

App.[2] 18a. In Appalachian Regional Healthcare, a majority panel (2 to 1) of the Sixth Circuit vacated an arbitrator's award reinstating employees it had discharged for refusing to work beyond their normal quitting time. Id. The court found that the award conflicted with the express provisions of the collective bargaining agreement. Id. In other words, the court strongly disagreed with the arbitrator's construction of the collective bargaining agreement and substituted the arbitrator's judgment with that of its own.

Squeezing through the loop hole that the Sixth Circuit created and the Third Circuit enlarged, a majority panel (2 to 1) of the Seventh Circuit utilized the same mistaken standard in Anheuser-Busch, Inc. v. Local Union No. 744, 280 F.3d 1133 (7th Cir. 2002). The Court quoted the instant case as authority:

> The [Third Circuit] held that "the arbitrator's decision conflicts with the express provisions of the Agreement between the Company and the Union" and therefore, "fails to draw its essence from that Agreement."

Id. at 1140-1141 *citing* Pennsylvania Power Co. v. IBEW 272, 276 F.3d 174 (3d Cir. 2001). It also cited as authority

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[2] Appalachian Regional Healthcare, Inc. v. Steelworkers, Local 14398, 245 F.3d 601 (6th Cir. March 29, 2001) was decided approximately six (6) weeks prior to this Court's decision in Major League Baseball Players Association v. Garvey, 532 U.S. 504 (May 14, 2001). Unfortunately, the Sixth Circuit did not correct its mistake after Garvey, and it reiterated the same mistaken standard in International Union v. Dana Corporation, 278 F.3d 548 (Jan. 22, 2002) ("an award so fails when: "(1) it conflicts with express terms of the agreement[.]").

the Sixth Circuit in Appalachian Reg'l Healthcare, Inc. v. United Steelworkers of Am., 245 F.3d 601 (6th Cir. 2001) for the proposition that a federal court may overturn an arbitrator when it believes that the decision conflicts with the express provisions of the collective bargaining agreement. Anheuser-Busch at 1143.

The Third, Sixth, and Seventh Circuits conflict with the First, Fifth, Eighth, and Ninth Circuits. The First Circuit faithfully noted:

> Even if we concluded that the arbitrator's interpretation of the agreement was erroneous, that finding would not, by itself, be enough to overturn the award.

Boston Medical Center v. Service Employees International Union, Local 285, 260 F.3d 16 (1st Cir. 2001) (the court reversed a federal district court that overturned an arbitration award that required an employer to reinstate a nurse who had been discharged for alleged substandard practices).

The Fifth Circuit also followed this Court's pronouncements in Weber Aircraft, Inc. v. General Warehousemen and Helpers Union Local 767, 253 F.3d 821 (5th Cir. 2001) (the court reversed a federal district court that overturned an arbitration award reinstating an employee who had been discharged). The Court stated:

> Accordingly, we must affirm the award "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority." . . . Thus, if we determine that the arbitrator has acted within the ambit of his authority as set by an

> arguable construction and application of the CBA, we have no authority to reconsider the merits of the arbitration ward, even if the parties argue that the award is based on factual errors or on misinterpretation of the CBA.

Id. at 824. *See Also* Brotherhood of Maintenance of Way Employees v. Soo Line Railroad Company, 266 F.3d 907 (8th Cir. 2001) (the court reversed a federal district court that overturned an arbitration award regarding the company's failure to award painting work to the union); Southern California Gas Company v. Utility Workers Union of America, Local 132, AFL-CIO, 265 F.3d 787 (9th Cir. 2001) (the court affirmed a federal district court that upheld an arbitrator's award reinstating an employee who tested positive for illegal drugs).

II. THIS PETITION PRESENTS AN IMPORTANT QUESTION OF FEDERAL LABOR ARBITRATION LAW

The U.S. Supreme Court has long mandated and recently reiterated that federal courts have a very narrow scope of review when considering requests to vacate labor arbitration awards.

> They [the union and the company] have "bargained for" the "arbitrator's construction" of their agreement. . . . And courts will set aside the arbitrator's interpretation of what their agreement means only in rare instances. . . . Of course, an arbitrator's award "must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice." . . **"But as long as [an**

> **honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," the fact that "a court is convinced he committed serious error does not suffice to overturn his decision."** . . . (the "proper judicial approach to a labor arbitration award is to "refus[e] . . . to review the merits").

Eastern Associated Coal Corporation v. United Mine Workers of America, District 17, 531 U.S. 57 (2000) (*quoting* Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960) (emphasis added); Paperworkers v. Misco, Inc., 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987)); Major League Baseball Players Association v. Garvey, 532 U.S. 504 (2001).

In 2001, the U.S. Supreme Court further expounded on the limited role to be taken by federal courts when reviewing labor arbitration decisions:

> Judicial review of a labor-arbitration decision pursuant to such an agreement is very limited. Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement. . . . When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's "improvident, even silly, factfinding" does not provide a basis for a reviewing court to refuse to enforce the award. . . . In discussing the courts' limited role in reviewing the merits of arbitration awards, we have stated that "'courts

> . . . have no business weighing the merits of the grievance [or] considering whether there is equity in a particular claim.'" . . . When the judiciary does so, "it usurps a function which . . . is entrusted to the arbitration tribunal."

Major League Baseball Players Association v. Garvey, 121 S.Ct. 1724 (2001) (*quoting/citing* Paperworkers International Union v. Misco, Inc., 484 U.S. 29 (1987); Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960) ("It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.")).

Without such a strict rule, parties would be discouraged from agreeing to Grievance/Arbitration provisions. Unions and companies would resort to self-help, i.e., strikes, picketing, and lock-outs. *See* Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364, 372 (1984) ("Arbitration promotes labor peace because it requires the parties to forego the economic weapons of strikes and lockouts.").

As long as federal courts are permitted to circumvent the U.S. Supreme Court's mandate by simply opining that the decision "conflicts with the express provisions of the collective bargaining agreement," the previous U.S. Supreme Court decisions on this subject are rendered meaningless.

III. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

The Court of Appeals below acknowledged that the arbitrator in this case was interpreting the collective bargaining agreement. The court stated, "[h]e reached this result on the basis of the collective bargaining agreement." App. The standard utilized by the Third Circuit contradicts the standard pronounced by this Court, because there is no question that the arbitrator arguably interpreted the collective bargaining agreement when he "reached this result on the basis of the collective bargaining agreement."

As pointed out by Circuit Judge Alito in his dissent, the majority in the instant case overturned the arbitrator simply because it strongly disagreed with his interpretation of the collective bargaining agreement. The arbitrator based his decision upon Article I, Section 3 of the collective bargaining agreement, which stated that the company may not "discriminate" against "any employee because of membership or non-membership in the Union." The arbitrator found that when the company unconditionally offered the VRP benefits to the supervisors while requiring the union employees meet certain conditions before being offered the VRP benefits was a violation of Article I, Section 3. The company then treated union members differently by requiring them to meet these conditions for VRP participation, while not requiring non-union members of the plan to clear these hurdles, thus discriminating against union members. This was a reasonable interpretation in light of the fact that the company funded a single pension plan to which union and non-union employees were participants and beneficiaries.

The Majority of the panel assumed that Article I, Section 3 was traced from Section 8(a) of the National Labor

Relations Act ("NLRA"), 29 U.S.C. §158(a)(3). App. at. However, there was absolutely nothing in the record to suggest such intent by the parties during contract negotiations, nor did the language express any such limitations. Furthermore, the parties chose different language from that of the NLRA. Section 8(a)(3) of the NLRA states:

> (a) It shall be an unfair labor practice for an employer-
>
> . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . .

29 U.S.C. §158(a)(3).

Moreover, the Majority mistakenly concluded that since "supervisors" are expressly excluded from protection by the NLRA, the union employees cannot be compared with supervisors for purposes of determining the union employees rights under the collective bargaining agreement. Such analysis of the NLRA would only apply if supervisors were requesting rights pursuant to the collective bargaining agreement. Moreover, such limitations were not present in the collective bargaining agreement. Article I, Section 3 provided that the company was prohibited from discriminating against union employees. It did not state, "except when compared to supervisors," or "as provided by the NLRA."

Local 272 and Penn Power agreed to have Arbitrator McDermott interpret their collective bargaining agreement in order to adjust the dispute, not the federal courts. Although Dissenting Circuit Judge Alito felt a different interpretation may have been more persuasive, he stated:

> . . . I cannot agree that the arbitrator's decision did not "draw its essence from the contract" or that the arbitrator was not "even arguably construing the contract." As noted, the arbitrator's decision drew its essence from and was based on a construction of the anti-discrimination section. That the arbitrator probably misconstrued that provision is beside the point. The parties bargained for the arbitrator's construction of the agreement, and that is what they got. By intervening to rescue the Pennsylvania Power Company from one of the consequences of its bargain, the majority has exceeded the proper scope of the court's authority.

App. 20a-21a.

In short, the Majority of the panel did exactly what the U.S. Supreme Court just mandated that federal courts cannot do -- substitute the court's interpretation of the contract for that of the arbitrator.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 01-2116

[Filed February 1, 2002]

PENNSYLVANIA POWER COMPANY,	)
Appellant,	)
v.	)
LOCAL UNION NO. 272 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO.	)
Appellee.	)

Appeal from the United States District Court
For the Western District of Pennsylvania
D.C. Civil No. 00-cv-01735.
District Judge: Honorable Gary L. Lancaster.

JUDGES:
Before: ALITO, BARRY, and ROSENN, Circuit Judges.

ORDER AMENDING OPINION

IT IS ORDERED that the slip opinion in the above case, filed on December 21, 2001, be amended as follows:

Insert the following sentence after the first sentence of the second full paragraph on page 11:

> "In directing that the award be vacated, we do not preclude the Union from applying to the District Court for a remand of the proceedings to the arbitrator."

By the Court,

/s/ _____
Maryanne Trump Barr
Circuit Judge

Date: February 1, 2002

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 01-2116

[Filed January 30, 2002]

PENNSYLVANIA POWER COMPANY,	)
Appellant,	)
v.	)
LOCAL UNION NO. 272 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO.	)
Appellee.	)

Present:

BECKER, Chief Judge,
SLOVITER, MANSMANN, SCIRICA,
NYGAARD, ALITO, ROTH, McKEE, RENDELL,
BARRY, AMBRO, and FUENTES, Circuit Judges

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing en banc filed by Appellee having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc,* the petition for rehearing en banc is DENIED. Chief Judge Becker and Judges Alito and Ambro would have granted rehearing.

BY THE COURT:

/s/ _____
Circuit Judge

DATED: January 30, 2002

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 01-2116

[Filed December 21, 2001]

PENNSYLVANIA POWER COMPANY,

Appellant,

v.

LOCAL UNION NO. 272 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO.

Appellee.

Appeal from the United States District Court
For the Western District of Pennsylvania
D.C. No.: 00-cv-01735.
District Judge: Honorable Gary L. Lancaster.

JUDGES:
Before: ALITO, BARRY, and ROSENN, Circuit Judges.

OPINION

ROSENN, Circuit Judge. In recent years, federal policy has encouraged the arbitration of unsettled labor disputes as the terminal point in the grievance procedures of collective bargaining agreements. Under such policy, the judicial function is not to review the merits of an arbitration award but is limited to a determination of whether the award "draws its essence from the collective bargaining agreement." *United Steelworkers of Am. v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597, 4 L. Ed. 2d 1424, 80 S. Ct. 1358 (1960). The narrow issue presented to us by this appeal requires us to make such a determination.

Local Union # 272 of the International Brotherhood of Electrical Workers, AFL-CIO (the Union) initiated a grievance under its collective bargaining agreement (the Agreement) with Pennsylvania Power Company (the Company) covering production and maintenance employees at its Bruce Mansfield Plant (the Plant) with respect to certain early retirement benefits. The Company offered these benefits in a separate cooperative agreement conditional upon the production and maintenance employees' cooperation with management's efforts to improve efficiency. The grievance proceeded to arbitration and the arbitrator found that the Union and its member employees had failed to cooperate with the Company's efficiency efforts. However, the arbitrator concluded that the failure of the Company to provide early retirement benefits to the Union members but to provide them to its supervisory personnel constituted a violation of its collective bargaining agreement with the Union. The award required the Company to provide voluntary retirement

program (VRP) benefits to the Union member employees at the Plant.

The Company timely filed a complaint in the United States District Court for the Western District of Pennsylvania seeking to vacate the award. The District Court declined to vacate the award. We reverse.

I.

The Company is a public utility engaged in the generation of electric power at its Plant in Shippingport, Pennsylvania. The Union represents the production and maintenance employees of the Plant,[1] excluding office clerical employees, guards, other professional employees and "supervisors as defined in the National Labor Relations Act as amended." The Agreement became effective on February 16, 1996, for a period of three years.

Article 1, section 3 of the Agreement provides that "the Company and the Union agree that they will not discriminate, coerce, nor intimidate any employee because of membership or non-membership in the Union."

The Company and the Union also separately agreed that they would "actively support and participate in a joint effort to improve the competitive position of the power plant represented by the Union." To encourage productive and financial efficiency in the face of impending deregulation in

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[1] The Company operates other electric generating plants in Pennsylvania and Ohio. They are not covered by the collective bargaining agreement involved in this dispute.

the electric generation industry, and the consequent "period of transformation," the Cooperative Agreement provided that the Company would utilize a voluntary retirement benefits program if it needed to reduce its workforce at the Plant. In return, the Union promised to cooperate with the Company in attaining production efficiency. The Cooperative Agreement expressly provided that both prerequisites -- determining the necessity to reduce workforce and determining whether the Union had cooperated in attaining production efficiency -- were within the sole discretion of the Company. The Company incorporated similar cooperative agreements in the collective bargaining agreement with other unions at its other plants.

In 1998, the Company notified the Union that there would be no workforce reductions at the Plant. In addition, even if the workforce were to be reduced, it notified the Union that the Plant bargaining unit employees would not be provided voluntary retirement benefits because the Company had determined that the Union had not met the qualifying conditions. In the meantime, the Company did offer such voluntary retirement benefits to bargaining unit employees at its other plants because the Company had determined that the unions representing those employees had cooperated with the Company and met the qualifying conditions. The Company also offered voluntary retirement benefits to supervisory personnel at both the Bruce Mansfield Plant and its sister plants.

As a result of the disparate treatment between the Plant bargaining unit employees and their supervisors with respect to the VRP benefits allegedly "paid out of their own pension plan," the Union filed a grievance under the

collective bargaining agreement on April 20, 1998. The Union submits that it "did not claim that its members were entitled to the VRP benefits under the cooperative agreement, nor did it ever claim that the supervisors were party to the cooperative agreement or within the same bargaining unit." The Union processed the grievance to arbitration.

The monies funding the Company pension benefits program are provided solely by the employer and maintained in a common fund.[2] The same pension plan covers all employees, both bargaining unit employees and supervisory personnel.

The arbitrator found that since the Union had not cooperated with the Company in attaining production efficiency that the Cooperative Agreement was not violated. Next, the Union claimed that the Company violated the anti-discrimination provision of the collective bargaining agreement. First, the Union alleged that providing such benefits to bargaining unit employees at other plants without providing them to the Bruce Mansfield Plant bargaining unit employees violated the anti-discrimination provision. The arbitrator disagreed. The arbitrator reasoned that bargaining unit employees at other plants were not similarly situated to the Bruce Mansfield Plant bargaining unit employees because

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[2] The Union in its brief argues that "the pot of money used to pay the supervisory personnel was funded by the supervisory personnel and the bargaining unit employees." (Br. at 2) This is erroneous; at oral argument counsel for the Union acknowledged that only the Company funds the retirement pension plan. The amount of monies paid into the pension fund by the employer on behalf of the Union member employees, however, was the subject of collective bargaining.

the former had cooperated with the Company in attaining production efficiency and the latter had not.

Second, the Union claimed that the Company violated the anti-discrimination provision because it offered retirement benefits to supervisory personnel at the Plant but denied them to the bargaining unit employees. This argument found favor with the arbitrator. He reasoned that because pension payments for supervisors and the production and maintenance employees were drawn from the same fund and supervisors were subject to the same qualifying conditions, the disparate treatment amounted to a violation of the anti-discrimination provision of the collective bargaining agreement. Therefore, the arbitrator directed that the voluntary retirement benefits be afforded to qualified bargaining unit employees at the Plant.

Challenging the award on legal and policy grounds, the Company timely filed suit in the United States District Court pursuant to section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) to vacate the arbitration award. The complaint alleged the following grounds: (1) the arbitrator's decision did not derive its essence from the Agreement; (2) the award directly conflicts with Article VIII § 2.d of the Agreement which bars the arbitrator from changing or adding to any provisions of the Agreement; (3) the arbitration award violates public policy; and (4) the arbitrator's decision is not supported by the record. Both parties cross-moved for summary judgment. The District Court denied the Company's motion but granted the Union's motion. The District Court held that the arbitration award neither violated public policy nor ignored the clear language of the Agreement, and was supported by the record.

II.

The District Court exercised subject matter jurisdiction pursuant to section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. Our review is plenary, and we apply the same standard as the District Court in reviewing the arbitration award. *Exxon Shipping Co. v. Exxon Seaman's Union*, 73 F.3d 1287, 1291 (3d Cir. 1996).

For almost a half century, the United States Supreme Court has consistently held that courts exercise a narrow and deferential role in reviewing arbitration awards arising out of labor disputes. See, e.g., *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36, 98 L. Ed. 2d 286, 108 S. Ct. 364 (1987); *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum and Plastic Workers of Am.*, 461 U.S. 757, 764 (1983). Most recently, in *Major League Baseball Players Association v. Garvey*, 532 U.S. 504,149 L. Ed. 2d 740, 121 S. Ct. 1724 (2001), and *Eastern Associated Coal Corporation v. United Mine Workers of America, District 17*, 531 U.S. 57, 62, 148 L. Ed. 2d 354, 121 S. Ct. 462 (2000), the United States Supreme Court reaffirmed that principle. The rationale for the court's limited role is to ensure that the federal policy of encouraging arbitration of labor disputes is not subverted by excessive court intervention on the merits of an award. *United Steelworkers of Am.*, 363 U.S. at 596.

In light of the federal policy encouraging arbitration awards, there is a strong presumption in their favor. *Newark Morning Ledger Co. v. Newark Typographical Union Local 103*, 797 F.2d 162, 165 (3d Cir. 1986). However, the

Supreme Court has at the same time made it clear that courts will intervene when the arbitrator's award does not "draw[ ] its essence from the collective bargaining agreement" and the arbitrator is dispensing his or her own "brand of industrial justice." *United Steelworkers of Am.*, 363 at 597.

Thus, an arbitration award ordinarily will not be vacated unless its essence is not drawn from the collective bargaining agreement. *W.R. Grace & Co.*, 461 U.S. at 764. To put it differently, if the arbitrator's interpretation is in any rational way derived from the collective bargaining agreement, the arbitration award will not be disturbed. *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969). An arbitration award will not be vacated just because the court believes its interpretation of the agreement is better than that of the arbitrator. *W.R. Grace &* Co., 461 U.S. at 764. It will be vacated, however, if there is a "manifest disregard" of the agreement. *Ludwig Honold Mfg. Co.*, 405 F.2d at 1128.

In *United Paperworkers International Union*, the Supreme Court made clear that an "arbitrator may not ignore the plain language of the contract." 484 U.S. at 38. Accordingly, this Court has held that "where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop" a reviewing court can vacate the award. *Exxon Shipping Co.*, 73 F.3d at 1295*; see also Ludwig Honold Mfg. Co.*, 405 F.2d at 1128 (noting limited review but stating that arbitrator's interpretation must still be derived from agreement). In other words, an award may be set aside when an arbitrator manifested a disregard of his authorization, and instead "dispensed his own brand of industrial justice." *Newark*

Morning Ledger Co., 797 F.2d at 165 (quoting *United Steelworkers of Am.*, 363 U.S. at 597).

As noted before, the arbitrator ruled that notwithstanding the Union's failure to comply with the qualifying conditions of the Cooperative Agreement for voluntary retirement benefits, to the extent the Company afforded Plant supervisory personnel voluntary retirement benefits it must afford the same benefits to the Plant bargaining unit employees. He reached this result on the basis of the collective bargaining agreement's prohibition of discrimination.

The arbitrator reasoned:

> Company witness Lubich made it clear that both groups were in the same [pension] plan, designed for all Ohio Edison and Pennsylvania Power bargaining-unit employees and Management personnel. Thus, the Company's making these VRP benefits available to Supervisory personnel at Bruce Mansfield even though they failed to meet the qualifying conditions, while denying those benefits to Bruce Mansfield bargaining-unit employees for failure to meet the same conditions constituted improper discrimination, in violation of Article I, Section 3 of the Agreement.

The Company here does not seek a judicial review of the merits of the arbitrator's award. The Company does not complain that the arbitrator erred in his interpretation of the Agreement. On the contrary, it claims that the arbitrator acted

outside the scope of his contractually delegated authority. The Agreement specifically provides that the arbitrator may not alter or amend it. The Company contends that when the arbitrator ruled that the Company violated the anti-discrimination provision of the Agreement the arbitrator altered and amended the Agreement, acted outside the scope of his authority, and failed to draw his decision from the essence of the Agreement.

In making this award, we agree with the Company that the arbitrator exceeded his powers under the Agreement. Moreover, he altered the Agreement in direct violation of its provision that he had no power to do so. He wrote into the contract that the Plant production and maintenance employees shall have the same benefits as the supervisory employees. The Agreement specifically excludes supervisory employees from its terms. Furthermore, the National Labor Relations Act (NLRA) excludes supervisors from the bargaining unit or from inclusion in a collective bargaining agreement. Supervisors are not employees for collective bargaining purposes under the NLRA.[3]

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[3] Congress amended the National Labor Relations Act in 1947 to specifically exclude supervisors from the definition of "employee." The exclusion, 29 U.S.C. § 152(3), provides in pertinent part: "The term 'employee' shall include any employee . . . but shall not include an individual employed . . . as a supervisor."

This exclusion "was accompanied by the congressional declaration in a new section 14(a)" providing in pertinent part that:

No employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

Nothing in the labor contract between the parties provides that production and maintenance employees shall have the same benefits as supervisory employees, particularly voluntary retirement benefits. Nothing in the anti-discriminatory provision of the contract between the employer and its union employees remotely provides a basis for a determination that the Company discriminated against its Union employees because it did not offer the same VRP benefits it afforded its supervisors. Congress understood that the dynamics of industry and commerce required that loyalty owed by supervisory personnel to their employer excludes them from collective bargaining for rank and file employees. The one is ordinarily paid on an hourly basis to comply with federal wage and hours laws and the statutory provisions for overtime pay after 40 hours of work per week. Supervisors are ordinarily paid on a salary basis and are not subject to the same overtime provisions of the law. Benefits usually differ between the two groups with respect to health, life insurance, bonus and other benefits.

Nothing in the Agreement, including the anti-discrimination provision, requires that supervisors and bargaining unit employees shall receive the same wages, vacations, or other benefits on the same basis as supervisors. The discriminatory provision of the Agreement refers solely to acts of discrimination between the Company and the Union and its members. This provision of the contract is common in many labor contracts. It apparently finds its genesis in sections 8(a) and (b) of the National Labor Relations Act, 29 U.S.C. §§ 158(a), (b) relating to unfair labor practices.

Robert A. Gorman, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 34 (1976).

Section 8(a)(3) provides in pertinent part that it shall be an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Section 8(b) provides in pertinent part that it is an unfair labor practice for a labor organization or its agents: "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of this title . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated." 29 U.S.C. § 158(b). Because supervisors are not "employees" under the NLRA for purposes of collective bargaining, an employer's affording retirement benefits to supervisors but not providing them to union member employees cannot possibly constitute discrimination between employees especially under the anti-discrimination section of the Agreement.

Carried to its logical conclusion, the arbitrator's reasoning would require an employer to provide its rank and file employees with the same benefits it provides its supervisors unless the employer establishes separate, independent funding for benefits for supervisors and another for non-supervisors, even though the funding is provided entirely by the employer. This is neither the law nor industry practice. It is highly impractical, costly and may even be unmanageable with large companies that have multiple bargaining units in one plant or more, and many separate collective bargaining agreements, to maintain, separate funds, investments, records, and reports.

The District Court concluded that the arbitrator's decision did not bring the supervisors under the terms and conditions of the Agreement, including the Cooperative Agreement. Rather, the District Court reasoned that the arbitrator simply concluded that "no explanation was given as to why supervisory personnel, unlike bargaining unit employees, were not subject to qualifying conditions for VRP benefits and such a lack of explanation amounted to discrimination in contravention of the [Agreement]." However, the employer had no obligation whatsoever to disclose in the grievance and arbitration proceedings its arrangements, contracts or obligations to its supervisors. Such explanation was irrelevant and we can see no evidentiary or legal reason for their production.

The arbitrator had strayed far beyond the scope of the arbitration. A requirement that an employer disclose its contractual terms for benefits to its supervisors in a proceeding to which they are not a party, or else face an order that they provide similar benefits to their Union production and maintenance employees, has no basis in reality, law, or industry practice. Certainly no such requirement is contained in the Agreement between the Company and the Union. What the arbitrator has wrought here not only alters and amends the collective bargaining agreement but far exceeds the permissible powers of the arbitrator. Were it applied generally in the marketplace, it would wreak consternation and havoc throughout American industry. The award amounts to nothing more than the arbitrator's personal brand of justice with which we do not agree.

III.

Accordingly, the arbitrator's decision conflicts with the express provisions of the Agreement between the Company and the Union. The arbitrator has written into the contract a provision obligating the Company to pay its Union employees voluntary retirement benefits to which indisputably it never agreed and as to which the Union employees concededly were not entitled.[4] The arbitrator's effort to justify the alteration of the collective bargaining agreement on the basis of an irrelevant discrimination clause in the Agreement is unreasonable and impermissible. The arbitrator has exceeded the scope of the arbitration provision and his decision fails to draw its essence from that Agreement.[5]

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[4] In *Appalachian Regional Health Care, Inc. v. United Steelworkers of America, AFL-CIO, Local 14398*, 245 F.3d 601, 605 (6th Cir.), *cert. denied* 122 S. Ct. 350 (2001), the court vacated an arbitrator's award because it conflicted with the express provisions of the collective bargaining agreement between the Company and the Union. The court stated: "Even if we were to credit the arbitrator's construction of the Agreement as against its conflict with express provisions, we would still have to vacate the award as it imports notions not found in the Agreement itself." *Id.* 245 F.3d at 606.

[5] A reviewing court can set aside an arbitration award if enforcement of the award violates public policy. *Eastern Assoc. Coal Corp.*, 531 U.S. at 62-63; *Exxon Shipping Co.*, 73 F.3d at 1291. An award can also be overturned if the arbitrator's decision is not supported by the record. *United Indus. Workers v. Virgin Islands*, 28 V.I. 211, 987 F.2d 162, 170 (3d Cir. 1993). In light of our ultimate disposition, we need not reach the Company's alternative arguments that the arbitration award should be vacated because it violated public policy or that the arbitrator's decision was unsupported by the record.

The judgment of the District Court will be reversed and the case remanded with direction to the District Court to vacate the award. Costs taxed against the appellee Union.

ALITO, Circuit Judge, dissenting.

Just last Term, the Supreme Court reminded us how narrow our proper scope of review is in a case such as this. In *Eastern Associated Coal Corporation v. United Mine Workers of America*, 531 U.S. 57 (2000), the Court wrote that when an "employer and union have granted to the arbitrator the authority to interpret the meaning of their contract's language," "[t]hey have 'bargained for' the 'arbitrator's construction' of their agreement, ... [a]nd courts will set aside the arbitrator's interpretation of what their agreement means only in rare instances." 531 U.S. at 61-62 (citation omitted). The Court continued:

> Of course, an arbitrator's award "must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice." *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987). "But as long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," the fact that "a court is convinced he committed serious error does not suffice to overturn his decision." *Ibid.*

Eastern Associated Coal Corporation, 531 U.S. at 62; *see also Major League Baseball Players Association v. Garvey*, 121 S. Ct. 1724, 1728 (2001).

The majority in this case overturns the arbitrator's decision the majority strongly disagrees with his interpretation of the collective bargaining agreement. The arbitrator held that the collective bargaining agreement obligates the employer to provide voluntary retirement benefits to union-member employees on the same terms as supervisors. In so construing the agreement, the arbitrator relied on article 1, section 3 of the agreement, the so-called anti-discrimination provision, which states that the company may not "discriminate" against "any employee because of membership or non-membership in the Union." Tracing this clause to Sections 8(a) and (b), the majority disagrees with the arbitrator's interpretation, reasoning that "[b]ecause supervisors are not 'employees' under the NLRA for purposes of collective bargaining, an employer's affording retirement benefits to supervisors but not providing them to union member employees cannot possibly constitute discrimination between employees under the anti-discrimination section of the Agreement." Maj. Op. at 9-10. The majority goes on to observe that the arbitrator's reasoning is supported by "neither the law nor industry practice" and "is highly impractical, costly and may even be unmanageable" for some companies. Maj. Op at 10.

I find the majority's interpretation of the collective bargaining agreement more persuasive than the arbitrator's, but I cannot agree that the arbitrator's decision did not "draw its essence from the contract" or that the arbitrator was not "even arguably construing the contract." As noted, the arbitrator's decision drew its essence from and was based on a construction of the anti-discrimination section. That the arbitrator probably misconstrued that provision is beside the point. The parties bargained for the arbitrator's construction

of the agreement, and that is what they got. By intervening to rescue the Pennsylvania Power Company from one of the consequences of its bargain, the majority has exceeded the proper scope of our court's authority. I must therefore respectfully dissent.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 01-2116

[Filed December 21, 2001]

PENNSYLVANIA POWER COMPANY,

Appellant,

v.

LOCAL UNION NO. 272 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO.

Appellee.

Appeal from the United States District Court
For the Western District of Pennsylvania
D.C. No.: 00-cv-01735
District Judge: Honorable Gary L. Lancaster

Argued: October 17, 2001

Before: ALITO, BARRY, and ROSENN, Circuit Judges.

Third Circuit Judgment - 12/21/01

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued on October 17, 2001.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered April 9, 2001, be, and the same is hereby REVERSED and the case REMANDED with direction to the District Court to vacate the award. Costs taxed against the appellee Union. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ _____
Acting Clerk

Dated: December 21,2001

Pennsylvania Power Co. v. Local Union 272

No. 01-2116

Costs taxed in favor of Appellant, Pennsylvania Power Co., as follows:

Appellant's brief	$93.06
Appellant's appendix	122.22
Appellant's reply brief	32.76
Sales tax	17.36
TOTAL	$365.40

Certified as a true copy and issued in lieu of a formal mandate on February 7, 2002

Teste: /s/ _____
Clerk
United States Court of Appeals
for the Third Circuit

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 00-1735

[Filed April 9, 2001]

PENNSYLVANIA POWER COMPANY,	)
Plaintiff,	)
v.	)
LOCAL UNION NO. 272 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO.	)
Defendant.	)

Before
Gary L. Lancaster, District Judge.

MEMORANDUM

Plaintiff filed this complaint pursuant to section 301 of the Labor Management Relations Act, as amended, 29 U.S.C. § 185 ("LMRA") , seeking to vacate an arbitrator's award.

Before the court are the parties' cross-motions for summary judgment.[1] For the reasons set forth herein, plaintiff's motion is denied and defendant's motion is granted.

I. BACKGROUND

The undisputed material facts necessary for the resolution of the claim are not complicated. Plaintiff Pennsylvania Power Company's ("Company") employees are represented by defendant Local Union No. 272 of the International Brotherhood of Electrical Workers, AFL-CIO ("Union"). At all relevant times, the Union and the Company were parties to a collective bargaining agreement ("CBA") which dictated the terms and conditions of the employment relationship. During the period covered by the CBA, the Union contended that its members were entitled to voluntary retirement pension ("VRP") benefits. The Company contended that it could award such benefits only to its management employees without offering them to its bargaining unit employees. The parties were unable to resolve the dispute and eventually the matter was submitted to an arbitrator for resolution. Eventually, the arbitrator ruled in defendant's favor holding that the award of VRP benefits to management employees without the satisfaction of any prerequisites while holding that Union employees must meet two qualifying conditions before receipt of the benefits

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[1] Although defendant styled its motion as a "motion to dismiss pursuant to rule 56," it is clear from the reference to Fed. R. Civ. P. 56 and the text of defendant's motion that it is seeking summary judgment. Accordingly, the court will review defendant's motion in that manner.

violated the anti-discrimination language in the CBA. Plaintiff now seeks a judicial review of that ruling.

II. STANDARD OF REVIEW

A district court is limited in its review of an arbitrator's award and "may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one." W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 764 (1983). The arbitrator's award will not be set aside "so long as it draws its essence from the collective bargaining agreement," and is not merely "his own brand of industrial justice." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). The award draws its essence from the agreement if "the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention." Roberts & Schaefer Co. v. Local 1846, United Mine Workers, 812 F.2d 883, 885 (3rd Cir. 1987).

The limited scope of our review does not allow us to determine which witnesses are credible, or what weight the creditable testimony should be afforded. Such a determination is for the arbitrator. *Kane Gas Light & Heating Co. v. International Brotherhood of Firemen & Oilers, Local 112*, 687 F.2d 673, 681 (3rd Cir. 1982). Nor may the court determine whether the arbitrator violated the principles of contract construction, and even if he did, the court is still not at liberty to overturn the decision so long as the construction given was rational. Roberts & Shaefer Co., 812 F.2d at 885.

The policy underlying a restricted judicial review is well reasoned. If the court is free to substitute its judgment for that of the arbitrator's, the credibility of the arbitration system would be undermined. Enterprise Wheel & Car Corp., 363 U.S. at 596. Consequently,

> the question of interpretation of the Collective Bargaining Agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

Id. at 599.

These well-settled principles are reaffirmed in United Paperworkers International Union v. Misco, Inc., 484 U.S. 29 (1987). "The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." Id. at 36. "As long as the arbitrator's award is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." Id. (emphasis added).

With these principles in mind, the court notes a limited exception. A court may vacate an arbitrator's award if it violates a "well defined and dominant public policy, discerned by reference to the laws and legal precedents and not from general considerations of supposed public interests." Exxon

Shipping Co. v. Exxon Seamen's Union, 73 F.3d 1287, 1291 (3d Cir. 1996) (internal quotations omitted). See also UPMC, Braddock v. Teamsters Local 250, 32 F. Supp.2d 231, 233 (W.D. Pa. 1998) (citing same principle as Exxon); Highlands Hosp. and Health Ctr. v. American Fed'n of State, County and Mun. Employees, Dist. Council 84, 1996 WL 163947 at * 3 (W.D. Pa. 1996) (same).

III. DISCUSSION

Plaintiff asserts several bases for vacating the arbitrator's decision. The court will address each of these in turn.

A. The Arbitrator's Decision Does Not Violate Public Policy

Plaintiff claims that the arbitrator's award should be vacated on public policy grounds because the award's effect is to require the Company to award a term of employment, the VRP benefits, in the same manner as it awards them to Union employees governed by the terms of the CBA. Plaintiff claims that this has the effect of holding supervisors to the terms of the CBA, something specifically forbidden by the National Labor Management Relations Act, 29 U.S.C. § 151 et seq., ("NLRA"). Defendant, on the other hand, asserts that the arbitrator was not including supervisors under the CBA, but, rather, interpreting the evidence and enforcing the non-discrimination clause of the CBA in finding that the Company offered no evidence as to why the supervisory employees did not have to meet certain qualifying conditions before they

received VRP benefits while union members had to do so.[3] That provision states as follows:

> The Company and the Union agree that they will not discriminate, coerce, nor intimidate any employee because of membership or nonmembership in the Union except as expressly provided in Article II hereof.

Article I, Section 3 of CBA.

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[3] Plaintiff attempts to amend its complaint to include this public policy argument to the extent that its original complaint cannot be construed to include it. Defendant opposes the amendment. The court grants the motion to amend in light of the liberal amendment provisions of Fed. R. Civ. P. 15. See, e.g. Sola v. Lafayette College, 804 F.2d 40, 45 (3d Cir. 1986) (noting "liberal mandate of Rule 15" in permitting amendment and holding that new legal theory raised at oral argument and on summary judgment should have been treated as a motion to amend the complaint). Moreover, defendant asserts no prejudice and is not in fact prejudiced by this amendment because plaintiff has fully briefed the public policy argument in its summary judgment papers. See Bair v. City of Atlantic City, 100 F. Supp.2d 262, 265 (D. N.J. 2000) ("Leave to amend under Rule 15 should be denied only in certain circumstances, such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice, or clear futility of the amendment."). Finally, statute of limitations issues are not a bar because under Rule 15(c), the amendment relates back to the time of filing of the original complaint since the public policy theory arises out of the same conduct, transaction, or occurrence alleged in the original complaint.

Application of the public policy exception requires a two step analysis. Exxon, 73 F.3d at 1291. The first consideration is whether a well defined and dominant public policy can be identified by reference to laws and legal precedents. Id.

Plaintiff begins its public policy challenge by pointing to a purported well defined and dominant public policy in the NLRA that forbids placing supervisors under a CBA. Plaintiff also cites case law supporting this conclusion.

After reviewing the NLRA and case law interpreting it, the court concludes that a well defined public policy exists in upholding the mandates of the NLRA. See, e.g., Glass, Molders, Pottery, Plastics and Allied Workers Int.'l Union v. Owens-Illinois, Inc., 758 F. Supp. 962, 972 (D. N.J. 1991) ("The public policy set forth in the NLRA 'represents well defined and dominant public policy.'" (quoting Van Waters & Rogers, Inc. v. International Brotherhood of Teamsters, Local Union 70, 913 F.2d 736, 742 (9th Cir. 1990)), aff'd, 941 F.2d 1201 (3d Cir. 1991) (mem.). Accord In re Local One Amalgamated Lithographers of America v. Stearns & Beale, Inc., 812 F.2d 763, 769 (2d Cir. 1987) (citing same proposition and collecting cases). Furthermore, the Act specifically mandates that supervisors should not be included under a CBA. See 29 U.S.C. § 152(3) ("The term 'employee' ... shall not include ... any individual employed as a supervisor."); 29 U.S.C. § 164(a) ("[N]o employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for purpose of any law, either national or local, relating to collective bargaining."); Beasley v. Food Fair of N.C., Inc., 416 U.S. 653, 659-60 (1974) (noting that sections 152(3) and 164(a) were

amendments to the NLRA intended to make clear that "[e]mployers were not obliged to recognize and bargain with unions including or composed of supervisors."). Therefore, any transgression of this principle is against well defined public policy.

In light of the court's conclusion that a well defined public policy exists in not violating the NLRA by having supervisors covered under a CBA, the court moves to the second step, the determination of whether the arbitrator's award, as reflected in the arbitrator's interpretation of the evidence and the agreement, violated the public policy.

Based on the stringent standard of review explained above, the court finds that the arbitrator's interpretation of the agreement does not violate public policy.

For instance, the arbitrator never held that supervisory personnel were subject to the terms of the CBA, including its Cooperative Agreement. Rather, the arbitrator simply concluded that after examining the entire record, no explanation was given as to why supervisory personnel, unlike bargaining unit employees, were not subject to qualifying conditions for VRP benefits and such a lack of explanation amounted to discrimination in contravention of the CBA. The arbitrator wrote that

> the Company made these [VRP] benefits available to Bruce Mansfield Supervisory personnel, and it has not been explained how they escaped the same hurdles which barred receipt of these benefits by Bruce Mansfield bargaining-unit employees.

> If they [the Company] were subject to the same conditions as were the bargaining-unit employees, **and there is no suggestion that they were not,** and yet afforded these benefits in spite of their not satisfying these conditions, then the Union charge of improper discrimination in violation of the Agreement would appear to have been demonstrated.
>
> Company witness Lubich made it clear that both groups were in the same plan, designed for all Ohio Edison and Pennsylvania Power bargaining-unit employees and Management personnel. Thus, the Company's making these VRP benefits available to Supervisory personnel at Bruce Mansfield even though they failed to meet qualifying conditions, while denying those benefits to Bruce Mansfield bargaining-unit employees for failure to meet the same conditions constituted improper discrimination, in violation of Article I, Section 3 of the Agreement.
>
> **So far as disclosed by this record, the posture of the two groups - Bruce Mansfield supervisors and Bruce Mansfield bargaining-unit employees - was the same. Thus, for purposes of these VRP benefits, they were alike, but they were not treated alike. That is the improper discrimination charged by the Union.**

Arbitrators Opinion and Award at ¶¶ 57-60 (first emphasis in

original, other emphases supplied). The court must grant such conclusion and such an interpretation of the CBA great deference. Again, without repeating the entire standard of review discussed in detail above, recall that the court's limited scope of review does not allow it to determine which witnesses are credible, or what weight the credible testimony should be afforded. Such a determination is for the arbitrator. Kane, 687 F.2d at 681.

In light of the arbitrator's findings and this court's limited standard of review, the court concludes that the arbitrator's decision does not violate public policy by including supervisors under the coverage of the CBA.

B. The Arbitrator Did Not Ignore the Clear Language of the CBA

Next, the court addresses plaintiff's argument that the arbitrator ignored the clear language of the CBA by purportedly including supervisors within the coverage of the CBA.

The court rejects this argument too because, as explained above, the arbitrator's interpretation of the CBA and the Cooperative Agreement is granted great deference and the interpretation is not irrational. In fact, the only interpretation of the CBA that is at issue is the arbitrator's conclusion that the CBA's anti-discrimination provision was violated, and the arbitrator's interpretation of this provision does not ignore the clear language of the CBA.

C. The Arbitrator's Decision is Supported By the Record

Finally, Plaintiff argues that the arbitrator's decision is unsupported by the record. Again, in light of the great deference this court must give to the arbitrator's findings, the court concludes that the arbitrator's decision is supported by the evidence. For example, plaintiff cannot establish that no rational interpretation of the record and the CBA support the arbitrator's decision. Instead, plaintiff merely asks the court to substitute plaintiff's interpretation of the record for the arbitrator's. The court has no authority to do this. Accordingly, plaintiff's third argument must fail.

IV. CONCLUSION

The court has considered all of plaintiff's arguments advanced in its pleadings and brief and conclude that although it uses the appropriate language, its claim rises no higher than one asserting that the arbitrator's interpretation of the disputed contract provisions is wrong and, based on the terms of the agreement read as a whole, another interpretation is more compelling. This may or may not be so; yet, in applying the applicable standard of review to the instant case, we conclude that to disturb the arbitrator's award, right or wrong, would exceed the scope of our reviewing authority. Defendant's motion for summary judgment must be granted.

The appropriate order follows.

District Court Memorandum and Order - 4/9/01

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 00-1735

[Filed April 9, 2001]

PENNSYLVANIA POWER COMPANY,	)
Plaintiff,	)
v.	)
LOCAL UNION NO. 272 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO.	)
Defendant.	)

ORDER

AND NOW, this 9th day of April, 2001, upon consideration of plaintiff's and defendant's motions for summary judgment [documents #8 and #5], IT IS HEREBY ORDERED that plaintiff's motion is DENIED and defendant's motion is GRANTED. Additionally, plaintiff's motion for oral argument on its motion [document #13] is DENIED and plaintiff's motion to amend its complaint is GRANTED [document #15].

BY THE COURT:

/s/ _____, J.

Dated: April 9, 2001

cc: All Counsel of Record

Joshua M. Bloom
Gatz, Cohen, Segal & Koerner
400 Law & Finance Building
Pittsburgh, PA 15219

CLERK'S OFFICE
United States District Court
for Western Pennsylvania

Civil Action No. 2:00-cv-01735
PENNSYLVANIA POWER v. LOCAL UNION NO. 272

There was entered on the docket April 10, 2001, an order granting deft's motion to dismiss.

James A. Drach, CLERK

APPENDIX F

Grievance No. U-78
(1998-272-62-BMP-U)

[Dated July 31, 2000]

In The Matter of Arbitration
Between

PENNSYLVANIA POWER COMPANY)
)
and)
)
INTERNATIONAL BROTHERHOOD OF)
ELECTRICAL WORKERS AFL-CIO)
Local Union 272)
)

OPINION AND AWARD

Subject: Discrimination Between Supervisors and Employees in Affording Voluntary Retirement Program Benefits

Statement of The Grievance:

> "Company violated Art. 1, Section(s) 2-3-4; Art. 5, Section 6; Art. 18, Section 1; but not limited to Cooperative Agreement and Statement of Policy dated 3/1/89

"Settlement Requested: Refrain from violating; make VRP available to affected members."

Agreement Provisions Involved:

Article I, Section 3 of the February 12, 1996 Agreement.

Statement of The Award:

The grievance is resolved as stated in the last paragraph of the accompanying Opinion.

Grievance Data

Filed:	4/20/98
Step 3 Answer:	11/3/98
Heard:	2/22/00
Transcript Received:	3/15/00
Post-Hearing Briefs Received:	3/31/00 and 4/25/00

Appearances

Company:

Harry A. Flannery	Attorney
Arthur Zygmunt	Industrial Relations
Charles Anderson	Director, Projects
Chuck Ferrell	Director, Maintenance
Donald Schneider	Plant Manager
Dennis Fuster	Plant Manager
Frank Lubich	Special Assign.
Michael Petras	Director, HR

Michael Ryhall	Director, IR
Tom Dugan	Shift Supervisor

Union:

Stanford A. Segal	Attorney
Mike McKinnon	President, IBEW Local 272
David Genenie	VP, IBEW Local 272
Terry Tice	Witness
Albert Hayter	Grievant

Opinion and Award - 7/31/00

PENNSYLVANIA POWER

Grievance No. U-78
1998 272-62-BMP-U

Background

This grievance claims that Management's not affording bargaining-unit employees of the Bruce Mansfield Plant various benefits of the Voluntary Retirement Plan, while providing such benefits to employees of other Company plants and to Management personnel of those other plants and of this plant amounts to improper discrimination against Bruce Mansfield employees, in violation of the Company's fiduciary duties under its Pension Fund, resulting in violation of Articles I, Sections 1, 2, and 3; V, Section 6; and XVIII, Section 1 of the February 12, 1996 Agreement; the Cooperative Agreement; and a March 1, 1989 Statement of Policy.

In the parties' negotiations for their 1996 Agreement, the Company initiated discussions about the future productive and financial efficiency of its electric-generating plants in view of what it saw as the coming deregulatory atmosphere in this industry. The parties negotiated to a Stipulation of Settlement and a separate document called the Cooperative Agreement. The latter became effective in 1998. It was to provide for, among other processes, force reductions to reduce costs, as balanced by related benefits for the employees so affected.

The main provision involved in this dispute is the one dealing with Early Retirement Benefits for those employees

put off work. The Company was to be the sole judge of whether there would be force reductions, and the Union, and the employees as well, were required to cooperate with Management's efforts in gaining productive efficiency. This Pension Plan was a common one for all Ohio Edison and Pennsylvania Power employees, and for Management personnel, as well.

In late 1998 Management decided, and so informed the Union, that there would be no force reductions at the Bruce Mansfield Plant. The parties' February 11, 1999 Stipulation of Settlement, ratified by the Union, repeated the Company position that there would be no such force reductions. Then, on March 22, 1998, the Company removed these Voluntary Retirement benefits (hereafter VRP benefits) from Bruce Mansfield employees, on the ground of failure of the Local Union to cooperate with Management's efficiency efforts.

This grievance had been filed on April 20, 1998, by which date another grievance had been filed complaining of the Company's alleged violation of the Basic Agreement in its removal of certain restored job-classification-wage benefits. Those benefits, too, were subject to the Union's and the employees' cooperation with Management's efforts to reduce costs and to improve efficiency.

That other grievance went to arbitration, and it was denied, mainly on the ground that the evidence established that, although the individual employees at Bruce Mansfield had made their contractually required cooperation with the Company's efficiency efforts, the Bruce Mansfield Union, as an institution, had not, so that a necessary condition for affording the claimed wage benefits had not been performed,

and thus, there was no violation of the Agreement in Management's not providing those benefits to Bruce Mansfield employees.

The Company, of course, insists that that finding applies here, as well, and bars the Union claim for these VRP benefits, which are subject to that same requirement of the Local Union's cooperation, which was not forthcoming. The Company notes also that there were no further force reductions, which would have been an additional trigger for these benefits. Since there were neither the Bruce Mansfield force reductions nor its required Local Union cooperation, the Company is sure that these VRP benefits are not due here.

The Union alleges that this grievance is about Management's alleged discriminatory failure to offer Bruce Mansfield employees the VRP benefits. In the Cooperative Agreement, mentioned above, Management indicated it wanted to put in place certain cost-saving processes and, in return, certain incentives would be afforded to the employees, contingent upon the occurrence of Bruce Mansfield force reductions and the cooperation of both the employees and of the Local Union. The Company then concluded that the Local Union had not cooperated and, therefore, it took away the incentives.

Two incentives were taken away, one of which was the subject of the grievance which earlier went to arbitration and was decided against the Union position. Both of the removed incentives were the subject of a National Labor Relations Board charge. The Board deferred to arbitration on both, and a Company letter of September 10, 1998 acknowledged that there were two issues in the charge.

The other grievance, relating to the Company's removal of certain wage increases for bargaining-unit employees, was the one which was decided in the prior arbitration ruling, which held that the Local Union had not lived up to its commitment to cooperate with the Company and that the Company, thus, had the right to take back the wage increases. The Board then concluded that that arbitration award had decided that issue and, therefore, that further proceedings on that issue of the charge were not warranted.

The present proceeding deals with the other element in that charge. The Union insists is does not seek here to relitigate the issue decided in the first arbitration. It agrees it could not prevail here under the written Agreement in light of that finding.

It says it is here under a different theory. Its position is, in alleged accordance with the Agreement and with Pension Law, that the Company's denial of the VRP benefits to Bruce Mansfield employees was discriminatory. Its explanation of that point is that this Pension Plan is not limited to the Bruce Mansfield Plant where these grieving employees work. This Pension Plan is referred to as the Ohio Edison Pension Plan, covering a number of different plants (six or seven generating plants), and the VRP benefits were denied to the Bruce Mansfield Plant employees, while they were given to those at other Company plants.

It is said, moreover, that Supervision at the Bruce Mansfield Plant was afforded the VRP benefits, but that the bargaining-unit employees there were denied those benefits. It is stressed that the Agreement denies to Management the

right to discriminate against employees because of their Union membership.

It is said, in fact, that the bargaining-unit has indeed been reduced, with much of the reduction coming because supervisors have been given the VRP benefits and bargaining-unit employees have been moved up into those vacant Supervisory positions, thus reducing the number of employees doing bargaining-unit work. The Union, therefore, argues that, even without the contractual requirement of force reductions to trigger the VRP benefits to these employees, the Company nevertheless became bound to afford them to these grieving employees in order to avoid the discriminatory effect that otherwise would result from affording the benefits only to Bruce Mansfield supervisors.

It is said that there is one Pension Plan, with one lump sum of money to be divided among all participants of the Plan. Thus, providing this VRP benefit to some proportion of the people covered by the Plan - perhaps 90 percent of those covered - and excluding these grieving Bruce Mansfield employees from it, is said to have a discriminatory effect on the body of the Plan and its ability to provide fairly bargained-for benefits in the future.

The Union urges that an ERISA Pension Plan, as this is, cannot discriminate against certain individuals in the Plan by denying them benefits given to others in similar situations.

The Company's initial reaction is that the VRP benefits for Bruce Mansfield never got into this Pension Plan. There were negotiations for the Cooperative Agreement.

Under that arrangement, it is said that the plants that did cooperate with Management would find through amendments that the VRP as agreed to in negotiations would become part of the Pension Plan. But, insists the Company, Union cooperation of Local Union 272 was not forthcoming here, as found in the earlier arbitration decision, so that these benefits for Bruce Mansfield employees never got into the Pension Plan and there thus could be no discrimination here.

Next, the Company claims that this grievance is not arbitrable. It insists that it has been withdrawn by the Union, and that the hearing scheduled for February 22, 1999 was canceled. The Company notified the American Arbitration Association that the Union had dropped this grievance. The Association then wrote the parties that it had been advised that this grievance had been withdrawn from arbitration. On March 2, 1999, the Union attorney wrote to the Association that the Local Union did not wish to withdraw this grievance from arbitration and requested that it be rescheduled.

The Company objected, saying there was an agreement between the parties that this grievance be withdrawn from arbitration, and that it should be honored.

The Union replied that the Company lawyer had contacted the Union lawyer and presented factual reasons why the grievance should not proceed to arbitration. Those reasons were passed on to the Local Union President, who gave permission to cancel the impending hearing, based on the factual presentation of the Company lawyer. The Union asserted that, after that, information was received by the Union which led it to believe that the factual assertions of the Company lawyer were not accurate, which led the Union to

ask that the hearing be rescheduled. It is said that there never was any written Union withdrawal of the grievance.

The Company answers that, following the Union's so-called reneging on its withdrawal of the grievance from arbitration, the Association took it upon itself to reschedule this grievance for hearing when, it is argued, its only role under the Basic Agreement is to help in selection of an Arbitrator. Thus, the Company would have it that the Association had no power to dictate that this grievance go forward to arbitration.

The Union replies that the Association's noting that this grievance had been withdrawn, included also a statement that, unless the Association heard to the contrary from the parties within seven days, it would mark its file closed. The Union says it notified the Association within five days that the grievance was not being withdrawn.

The Company argues also that, prior to withdrawal of this grievance from arbitration, the Union was put on notice that there would be no force reduction at this Plant. Thus, the Union knew there would be no reduction in the workforce and, therefore, that the withdrawal of this grievance from arbitration should remain in effect.

Management urges that, if this Arbitrator were to rule that the VRP benefits were applicable for these Bruce Mansfield employees, he would be reducing the force, an authority not conferred on an Arbitrator by Article IV of the Basic Agreement. It is said that that also would exceed the Arbitrator's authority under Article VIII, Section 2(d) of the Agreement.

The Union replies that, indeed, there has been a force reduction. It means by that that a number of Bruce Mansfield supervisors have been put off work and have been afforded VRP benefits, and bargaining-unit employees have been moved up into those vacancies, thus reducing the total number of employees actually performing bargaining-unit work. Accordingly, it says that there has been a real reduction in numbers of bargaining-unit employees, but there has been also a real increase in the number of supervisors. Therefore, it is said that in granting these VRP benefits to supervisors, the Company was not carrying out a plan to increase efficiency and productivity by reducing numbers. It is said that the size of the Supervisory force has been increased.

The Union sees support for its discrimination argument in an Arbitration Award in its Exhibit 3. It is said that Award held that even in the absence of a contractual obligation, the denial of a benefit (payment of a bonus incentive) to employees of this Local Union, while providing that benefit to other participants, meant that the Company was improperly discriminating against these Bruce Mansfield employees.

Finally, the Union argues that these VRP benefits were put in place in contemplation of the need for layoffs from the bargaining unit. It relies in that regard on a 1992 Arbitration Award in a dispute between these parties. There it was held that layoffs were not allowed under the Agreement because of certain sub-contracting language and that layoffs which had been made were done in violation of Article IV of that Agreement. The Union notes that that Agreement language remains in place, and it urges, therefore, that the Company here could not have contemplated this VRP package

as being connected to an intention to layoff employees. It is said that, instead, this incentive package was meant to be in lieu of the Company's desire to lay off employees. The Union position is that, with the Company knowing it could not properly lay off employees while sub-contracting was going on, it looked to other means to reduce the force, and that means was this VRP. The conclusion is that the Company testimony saying that the VRP benefits could not be expected to be put in place because there were no layoffs is contrary to the facts.

The Company urges that the only way these VRP benefits would be available to members of this Local Union was through negotiations which would trigger an amendment to the Pension Plan. It says there were no such negotiations since it claims there was no reduction in the workforce nor was there the necessary cooperation by the Local Union.

The Company notes also that the employees do not contribute to this Pension Plan and that it is over funded, so that additional benefits, such as these, could be provided, if there were the necessary prerequisites and further negotiations to put these employees within the coverage on this point within the Pension Plan.

Union evidence said that before February of 1996 there were 466 bargaining-unit members of this Local Union 272 and that number was reduced by 98 so that, by February of 1999 there were 368 bargaining-unit employees. That employee reduction came from an April 1, 1996 layoff.

Local Union President McKinnon said that there were further force reductions by way of upgrades, that is, that

Supervisory personnel were put off and bargaining-unit employees were upgraded to those then vacant Supervisory slots which further reduced the bargaining-unit by 12 or 13, leaving a total of about 335. Such "employees" remain within the protection of the Agreement unless they are made permanent "members" of Supervision. Within six months of that designation, they must return to the bargaining unit or they no longer will be covered by the Agreement.

The Union agrees that the employees moved up to Supervisory slots at this plant did not ask for severance benefits, since, the witness said, they were in upgrade positions. The witness agreed also that there were no formal "layoffs" from the workforce as would be covered by the "reduction" language of the Agreement, but he said there still were "reductions."

The Cooperative Agreement began in February of 1996 and was canceled in March of 1998. By the original agreement it would have lasted for the term of the Basic Agreement or until February of 1999. McKinnon said that the Bruce Mansfield Supervisory force had increased since the beginning of the Agreement and the Cooperative Agreement in 1996.

The Union witness said he thought the VRP benefits were part of Bruce Mansfield's Pension Plan because they had been offered to and received by First Energy employees at other plants and by supervisors at other plants and at this plant, as well. The thought was that anything offered to a member of the Pension Plan should be offered to all such members. He could not say, however, that the VRP benefits were part of the one, overall Pension Plan. The witness

agreed also that, contingent upon the VRP benefits' becoming part of the Pension Plan were certain requirements that had to be met, namely, cooperation by the employees and by the Local Union with Management's increased efficiency efforts, with the stipulated agreement that the Company retained discretion to decide whether or not that cooperation had been provided.

Union witness Hayter, who was Local Union Vice President from 1997 until 1999, said he thought from twenty-seven to twenty-nine bargaining unit employees would have been eligible for these VRP benefits.

Union witness Tice, still an active employee of Bruce Mansfield, said he was eligible by age to enjoy these VRP benefits, but that they were not offered to him. He said that, as he understood the result of the parties' negotiations of this subject, as it was explained to him by two named Union officials, the Company was bound to offer VRP benefits to eligible employees one time during the Agreement period, and that was in no way to be limited by whether or not the Company had decided to lay off employees.

Company witness LaFleur, First Energy's Director of Employee Benefits including responsibility for pension administration, explained that there are a number of steps which must be taken in order for something like this VRP to become part of this Pension Plan. It first must be approved by the Board of Directors, and then the Pension Plan itself must be amended to specify that the VRP has become part of it, with a listing of those entitled to participate, and the specific provisions of the VRP. The various Local Unions representing employees at the several Company (First Energy)

plants must then negotiate as to what benefits will be in the VRP.

LaFluer said that, although the one Pension Plan is under a common umbrella, there are a number of different benefit structures for bargaining-unit employees at different Companies within the Ohio Edison conglomerate. The witness said that there. never were separate negotiations and amendments to place the VRP at this Bruce Mansfield Plant within the one, overall Pension Plan.

LaFluer said also that a February 3, 1989 letter from First Energy to the then President of this Local Union 272 meant only that the funding for such benefits would come from the Pension Plan.

Since the Pension Plan is and always was fully funded, LaFluer said that the benefit which each participant has accrued as of the time an employee would become eligible means there are sufficient dollars to cover those benefits. At various other plants where the two contingencies (employee and Local Union cooperation and Management's decision to make layoffs) occurred, the Pension Plan was amended to include these VRP benefits. That simply did not occur at Bruce Mansfield because the two conditions never were met, in that the Local Union did not cooperate and Management did not declare any layoffs. Since these VRP benefits were collectively bargained with the various local unions at the several plants, and were jointly approved, with the two conditions stressed by the Company, it cannot see how there could have been any discrimination. That is, at the other plants the two conditions were met and the parties negotiated for these benefits to be included in the overall Pension Plan.

There was no compliance with the two conditions at this Bruce Mansfield plant and, therefore, there was no amendment of the Pension Plan to include these VRP benefits as to its employees. Since there was collective bargaining and recognition of different fact settings between this and the other plants, the Company urges that there could have been no discrimination.

LaFluer explained that in the period of 1996 to 1999 the Pension Plan was a common one, designed for all Ohio Edison and Pennsylvania Power employees, including Management personnel. The Union stresses that some Bruce Mansfield Supervisory personnel were afforded these VRP benefits, but that Bruce Mansfield bargaining-unit employees were not.

Company witness Dugan had been President and Financial Secretary of Local 272 at the 1996 times of the Stipulation of Settlement, including the Cooperative Agreement, and the Labor Agreement of that year. Dugan said it was part of his responsibilities in those functions to explain the documents to the Local Union membership. He did that and told them the voluntary-retirement program was part of the Cooperative Agreement and, if the Union and employees cooperated with Management's efforts toward greater efficiency and productivity, those benefits would be available for Bruce Mansfield employees. He told them also that, if those contingencies were not met, there would be no VRP benefits for Bruce Mansfield employees. There were three meetings held in which all that was explained. Dugan said he had a specific discussion with Union Witness Tice and never told the latter that these benefits would follow, without conditions. Dugan says he told Tice that there were

conditions, in that the voluntary-retirement benefits could be withheld by the Company at its discretion if there was not the required cooperation and force reductions. Dugan said he expressly discussed those conditions in relation to the employees' being upset by the Company's requiring that there be cross-functioning (employees' crossing skills) and that there be layoffs, as conditions to achieving these benefits.

The Union noted that, after these events, Dugan went into Management. He had lost his re-election effort in June of 1996 and went to Management in March of 1998.

Dugan said the Bruce Mansfield employees were upset by the layoff that occurred in April of 1996. He said the Union knew of the layoff before it occurred and while they were negotiating the Cooperative Agreement. There were no grievances filed against the April-1996 layoffs.

Dugan said that he and the Union negotiators knew that, if there were to be any additional layoffs, the affected employees would receive these benefits. There were no additional layoffs, however.

Dugan agreed that the bargaining-unit force was reduced by employees either quitting or being moved to Management positions.

Local Union President McKinnon was recalled and testified that there had been voluntary-retirement programs at Bruce Mansfield in 1992 and 1994 and without negotiations with the Local Union. Those benefits were offered to certain employees and certain members of Management, perhaps about twenty in all. They were meant as an incentive package

to take early retirement. That was separate from the Pension Plan. McKinnon said that was not approved by the Local Union because it was never was brought to the membership. It simply was inaugurated by the Company.

Company witness Dugan was recalled, and he said that, indeed, there were negotiations with the Local Union regarding that voluntary-retirement program. Dugan, the Recording Secretary, and the Treasurer, met with the Chairman of the Board. The Union Representatives took that Company proposal to the Local Union Executive Board, and it was approved. About twenty employees received that voluntary early-retirement benefit. The minutes of that Executive Board approval were read to the general membership and were approved. A stipulation on that then was signed.

FINDINGS

In light of all evidence on the point it could not reasonably be concluded that this grievance had been withdrawn from arbitration, with finality.

On the merits, it is clear, under the terms of the Cooperative Agreement, that payment of these VRP benefits was contingent upon two conditions: (1) the employees' and the Local Union's cooperating with Management's efforts to increase efficiency, and (2) Management's decision to reduce the force. The evidence indicates that neither event occurred at this plant. Thus, the Union can take no benefit from the Cooperative Agreement.

The Union then urges that failure to afford those benefits to Bruce Mansfield bargaining-unit employees, while providing them to employees at other Company plants and to supervisors at various Company plants, including supervisors at this plant, is improper discrimination, in violation of the Basic Agreement, the Cooperative Agreement and a 1989 Statement of Policy.

But it is not seen what legitimate claim of improper discrimination could arise from Management's providing benefits to employees or to supervisors of plants where force reductions were carried out and where the employees and the Local Unions did cooperate with the Company's efforts to increase productive efficiency, in light of the fact that at this Bruce Mansfield plant there were neither the force reductions nor the Local Union's cooperation. That lack of Local Union cooperation already has been found in the earlier arbitration award in a matter sufficiently related to this one to make that Finding binding here, and to establish that these bargaining-unit employees were not treated discriminatorily. Discrimination requires that some in a group be treated differently from others in the group, in identical circumstances. The duty is to treat all persons alike alike. These groups were not alike.

The Union would have it, however, that, indeed, there were force reductions here, at least in the sense of there now being fewer persons doing bargaining unit work than in the past because some number of them were assigned temporarily up to Supervisory positions upon the reduction of Supervisory personnel.

But those actions were not "layoffs" of bargaining-unit employees and, moreover, the Union argues also that these benefits really were not meant to be some kind of return for "layoffs," but were to be afforded to employees in lieu of layoffs.

But, whatever posture these benefits were to have, they still were contingent also upon Local Union cooperation, and that did not occur here.

Moreover, there were no "layoffs" here, and there has been no "reduction" in the number of bargaining-unit employees, as the Union agrees. Upon being assigned voluntarily, to Supervisory positions, employees continue to be members of the bargaining unit. Thus, there was only a reduction in a mathematical sense of the number of persons doing bargaining-unit work and not in a labor-relations sense. These "upgraded" employees could retain their bargaining-unit status for years. Only upon being declared "permanent" in a Supervisory position could they be considered out of the bargaining unit, and even that would not occur unless they waited more than six months after the "permanent" designation to seek to go back to a bargaining-unit job. There was, indeed, a reduction in the number of employees in the bargaining unit, but only by reason of employee resignations, deaths, and terminations.

In some measure, at least, the same reasoning could apply to the Union's claim that Management's not making these benefits available was in violation of the overall Pension Plan. The fact is that these benefits do not, and did not here, become part of the Pension Plan until negotiated by the Local

parties and expressly made a part of the Pension Plan by an amendment to it. That was not done here.

That well could be the proper contractual outcome of this entire dispute, were it not for the fact that, in spite of all that was recited above, the Company made these benefits available to Bruce Mansfield Supervisory personnel, and it has not been explained how they escaped the same hurdles which barred receipt of these benefits by Bruce Mansfield bargaining-unit employees.

If they were subject to the same conditions as were the bargaining-unit employees, and there is no suggestion that they were not, and yet were afforded these benefits in spite of their not satisfying those conditions, then the Union charge of improper discrimination in violation of the Agreement would appear to have been demonstrated.

Company witness Lubich made it clear that both groups were in the same plan, designed for all Ohio Edison and Pennsylvania Power bargaining-unit employees and Management personnel. Thus, the Company's making these VRP benefits available to Supervisory personnel at Bruce Mansfield even though they failed to meet the qualifying conditions, while denying those benefits to Bruce Mansfield bargaining-unit employees for failure to meet the same conditions constituted improper discrimination, in violation of Article I, Section 3 of the Agreement.

So far as disclosed by this record, the posture of the two groups - Bruce Mansfield supervisors and Bruce Mansfield bargaining-unit employees - was the same. Thus, for purposes of these VRP benefits, they were alike, but they

were not treated alike. That is the improper discrimination charged by the Union.

The Company has argued that, if the Arbitrator were to sustain this grievance, he would be exercising improperly and beyond his authority a Management power of Article IV to reduce the force, and would be in violation also of Article VIII, Section 2-d, denying to the Arbitrator the power to change, add to, or subtract from, any provisions of the Agreement.

But neither point has merit. What is decided here is not that there shall be an Arbitrator-directed reduction of the force, or an Arbitrator-directed initiative to ignore the failure of the Local Union to cooperate with the Company efforts toward greater efficiency. What is decided is that the Company's ignoring the failure of the Bruce Mansfield plant on those two points, while nevertheless affording the VRP benefits to Bruce Mansfield Supervisory personnel, requires, in order to comply with the Agreement's prohibition of discrimination that those benefits be afforded also to qualified Bruce Mansfield bargaining-unit employees.

Accordingly, the grievance will be denied as to all claims, except that it will be sustained to the extent of directing that the VRP benefits will be afforded to those Bruce Mansfield bargaining-unit employees who otherwise would have been qualified for them prior to the termination of the Cooperative Agreement.

AWARD

The grievance is resolved as stated in the last paragraph of the accompanying Opinion.

/s/ _____
Clare B. McDermott
Arbitrator